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No. 88-1099

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BV ENGINEERING,
Petitioner,
v.
UNIVERSITY OF CALIFORNIA, LOS ANGELES
(THE REGENTS OF THE UNIVERSITY OF CALIFORNIA),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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February 2, 1989

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MOTION OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Association of American Publishers, Inc. ("AAP") and the Association of American University Presses, Inc. ("AAUP") respectfully move for leave to file the attached brief *amici curiae*. The consent of counsel for Petitioner has been obtained, but counsel for Respondent has refused consent.

The AAP is a trade association of book publishers. Its approximately 300 members publish between 70 and 75% of the dollar volume of all books published in the United States. Its members' publications include text, technical

and reference books, works of fiction and general nonfiction, together with a variety of works in other media including computer software and databases.

The AAUP is a not-for-profit association of university presses. Its 80 members include the presses of virtually every distinguished university in the United States, as well as several Canadian and international scholarly publishers.

As publishers and copyright proprietors, *amici* have a direct and compelling interest in this case. All depend on competitors' and customers' respect for the property rights guaranteed by § 106 of the Copyright Act. Most importantly, all market their copyrighted works to states and state entities. Some AAP and AAUP members derive a substantial portion of their income from state entities including universities such as Respondent U.C.L.A., which was held in the opinion below to have Eleventh Amendment immunity from liability for damages for copyright infringement. This decision, if not reviewed and reversed, is likely to have greater impact upon certain of *amici's* members than upon Petitioner, since some of them rely to such a large extent on state entities for their income.

The Court should grant *certiorari* in order to ensure that states and state entities not obtain—demonstrably against congressional intention—a judicial license freely to duplicate, adapt, or publicly perform others' copyrighted works without authorization or any payment of royalties until such time as such infringements may be discovered and an injunction sought and issued.

To present their views as to why this Court should grant *certiorari* in this important copyright case, *amici* move for leave to file the attached brief *amici curiae.*

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. AND THE ASSOCIATION OF AMERICAN UNIVERSITY PRESSES, INC. IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF *AMICI CURIAE*

The interest of *amici* is set out in the foregoing motion.

SUMMARY OF ARGUMENT

1. Congress has the power to abrogate states' Eleventh Amendment immunity whenever it enacts legislation under its plenary authority, including the authority found in such diverse provisions of Article I of the Constitution as those covering interstate commerce, copyright, and bankruptcy matters. This Court has never held otherwise. A decision here not to grant *certiorari* and reverse the judgment below would not only deprive Peti-

tioner of a federal forum for seeking relief from state Respondent in the instant controversy, but also leave in substantial doubt Congress' ability to redress the situation by legislation.

2. At the conclusion of a comprehensive process of examination and revision of the copyright law, Congress enacted a statute that by its terms and its structure clearly envisaged states' liability for copyright infringement damages. The judgment below contravenes that clear congressional intent, duly enacted into law.

ARGUMENT

I. ARTICLE I OF THE CONSTITUTION EMPOWERS CONGRESS TO SUBJECT STATES TO SUITS FOR COPYRIGHT DAMAGES IN FEDERAL COURTS

The Ninth Circuit assumed, without deciding, that Congress was empowered to subject states to copyright liability notwithstanding the Eleventh Amendment, and rested its judgment in favor of the Regents on the ground that Congress had not in fact successfully invoked that assumed power. However, the question of congressional power is necessarily implicated in this case, since the Regents argued below that Congress could not subject them to copyright liability absent a constitutional amendment. The judgment below cannot be reversed unless Congress can, in fact, impose liability on state entities for copyright violations. This Court's resolution of this question is therefore urgently needed.

In most Eleventh Amendment cases, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals.*" *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 240 n.2 (1985) (emphasis in original) (quoting *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 293-94 (1973) (Marshall, J., concurring in result)). Whenever this Court has held the

Eleventh Amendment to preclude federal court jurisdiction, some other forum has been available. *See, e.g., Atascadero*, 473 U.S. at 240 n.2 ("It denigrates the judges who serve on the State courts to suggest that they will not enforce the supreme law of the land"); *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 121-23 (1984) (requiring pendent state law claims to be brought in state court); *Welch v. State Dep't of Highways*, 107 S.Ct. 2941, 2953 n.19 (1987) (worker's compensation claim could be pursued in state court).

For petitioner and all others holding copyrights, however, Congress long ago decided that to maintain the unity and integrity of copyright law—a worthy goal that Congress is surely empowered to pursue—no relief can be sought in state courts.[1] The Copyright Act, by preempting state laws that might otherwise cover copyright infringing activities,[2] precludes *any* possibility that copyright owners might seek relief from state entities on state law grounds in state courts.[3]

For publishers represented by *amici*, as well as others —authors, artists, playwrights, filmmakers, composers, computer programmers, and more—of this country's creative community, therefore, a holding that Congress could not under its Article I powers abrogate Eleventh Amendment immunity would be devastating. AAP and AAUP members, for example, do substantial business with state entities.[4] Indeed, some specialized publishers

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[1] 28 U.S.C. § 1338(a) (1982).

[2] 17 U.S.C. § 301 (1982).

[3] *Cf. Welch*, 107 S. Ct. 2941, where a state law remedy was potentially available.

[4] AAP estimates that, in 1986, U.S. book publishers sold $1.1 *billion* worth of college and university textbooks to customers with potential Eleventh Amendment immunity who might well not be liable for damages should they choose to copy rather than purchase such materials. *See generally*, Register of Copyrights, *Copyright*

may do the bulk of their business with entities having potential Eleventh Amendment immunity. If the Eleventh Amendment closes the federal courthouse door to them, states would then be free to ignore the carefully crafted balance created by the copyright law, 17 U.S.C. §§ 101 *et seq.*[5] As the Ninth Circuit noted, "our holding will allow states to violate the federal copyright laws with virtual impunity."[6]

The potential availability of actions for damages against state employees in their individual capacities, *Richard Anderson Photography v. Radford University*, 852 F.2d 114, 122 (4th Cir. 1988), does little to restore the congressionally designed balance, and cannot effectively protect Petitioner, *amici*, and other copyright owners. Large-scale infringements may lead to substantial liability,[7] as to which state employees might well be partially or totally judgment-proof.

Liability of States and the Eleventh Amendment 5-17 (1988) (hereafter "1988 Register's Report").

[5] While under Eleventh Amendment doctrine some manner of injunctive relief may be available, Congress could not have considered injunctions alone to be an adequate remedy for copyright infringement. By their nature, injunctions can merely "forestall future violations." *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952). Injunctions, unlike damages, do not provide any degree of recompense to aggrieved copyright owners for infringements that have already occurred, or for markets that have been substantially eroded, if not destroyed. Nor are they available without a likelihood of repeated harm by the infringing party. A limitation to injunctive relief would eliminate any real possibility of favorable settlement for copyright owners and would permit the continuation of infringing activity by great numbers of entities, until in each separate case a particular infringement happened to be detected and an injunction obtained.

[6] *BV Engineering v. U.C.L.A.*, 858 F.2d 1394, 1400 (9th Cir. 1988).

[7] Congress, recognizing the necessity of providing substantial damages in order to deter infringements and compensate their victims, has recently doubled the monetary limits in the section of the

Until relatively recently, very few copyright cases had involved Eleventh Amendment issues. The only two cases concerning the Copyright Act of 1909 were split on the Eleventh Amendment question. In *Wihtol v. Crow*, 309 F.2d 777 (8th Cir. 1962), the court, after observing that the defendant school district was "an instrumentality of the State . . .," [8] held it immune from liability for a teacher's infringing duplication of a musical work, while in *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979), the court held a state liable for the unauthorized public performance of music. *Mills Music* has been characterized as "the better view" by a court and a leading scholar,[9] and, in a law review note, as "a closer reading of the statutory intent." [10] In the last several years, however, additional courts have felt themselves constrained to accord Eleventh Amendment immunity in copyright cases,[11] notwithstanding the evident conflict between that result and the clear congressional intention to subject

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copyright law providing for statutory damages for infringement, 17 U.S.C. § 504(c). See 134 Cong. Rec. H10093 (October 12, 1988).

[8] 309 F.2d 782.

[9] *Richard Anderson Photography v. Radford University*, 633 F. Supp. 1154, 1160 n.14 (W.D. Va.), *aff'd*, 852 F.2d 114 (4th Cir. 1988), *cert. pending* No. 88-651; 3 M. Nimmer, *Nimmer on Copyright*, § 12.01[E] (1988).

[10] Note, The Applicability of Eleventh Amendment Immunity Under the Copyright Acts of 1909 and 1976, 36 Am. U.L. Rev. 163, 183 (1986).

[11] *BV Engineering v. UCLA*, 858 F.2d 1394 (9th Cir. 1988); *Richard Anderson Photography v. Radford University*, 852 F.2d 114 (4th Cir. 1988), *cert. pending* No. 88-651; *Cardinal Indus. v. Anderson Parrish*, No. 83-1038-Civ-T-13 (M.D. Fla. Sept. 6, 1985), *aff'd*, 811 F.2d 609 (11th Cir.), *cert. denied*, 108 S.Ct. 88 (1987); *Lane v. First Nat'l Bank of Boston*, 687 F. Supp. 11 (D. Mass. 1988); *Woelffer v. Happy States of America, Inc.*, 626 F. Supp. 499 (N.D. Ill. 1985); and *Mihalek Corp. v. Michigan*, 595 F. Supp. 903 (E.D. Mich. 1984), *aff'd on other grounds*, 814 F.2d 290 (6th Cir.), *cert. denied* 108 S.Ct. 503 (1987). *Contra, Johnson v. University of Va.*, 606 F. Supp. 321 (W.D. Va. 1985).

"anyone" infringing copyrights to federal suit.[12] The Copyright Office of the Library of Congress has recently published a report concerning Eleventh Amendment-copyright issues in which it identified numerous states' assertions of immunity from liability.[13]

The Ninth Circuit noted that this Court may decide the congressional power question in *Pennsylvania v. Union Gas Co.*[14] Even if this Court should there hold that the Commerce Clause[15] does not grant Congress the power to abrogate Eleventh Amendment immunity, there remains the question whether the Patent and Copyright Clause,[16] under which uniform federal property rights

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[12] That conflict was acknowledged by the Ninth Circuit here:

> "Although we find [BV's] arguments compelling, we are constrained by the Supreme Court's mandate that we find an abrogation of Eleventh Amendment immunity only when Congress has included in the statute unequivocal and specific language indicating an intent to subject states to suit in Federal Court. Such language is absent from the Copyright Act of 1976. *We recognize that our holding will allow states to violate the federal copyright laws with virtual impunity.*" *BV Engineering*, 858 F.2d 1394, 1400.
> (Emphasis added.)

[13] In its recent congressionally requested inquiry, the Copyright Office noted that, in addition to the six states asserting Eleventh Amendment copyright immunity in the cases cited in n.11, *supra* (Virginia, California, Florida, Massachusetts, Michigan and Illinois), North Carolina, Wisconsin, Minnesota, and Texas have asserted their immunity in other contexts. 1988 Register's Report at 8, 9, app. C at CRS-21.

[14] *United States v. Union Gas Co.*, 832 F.2d 1343 (3d Cir.), *cert. granted sub nom. Pennsylvania v. Union Gas Co.*, 108 S.Ct. 219 (1988). AAP and AAUP have filed a brief *amici curiae* in that case, in support of Respondent Union Gas' argument that Article I grants Congress the power to abrogate Eleventh Amendment immunity.

[15] U.S. Const., Art. I, § 8, cl. 3.

[16] U.S. Const., Art. I, § 8, cl. 8.

were created in 1790,[17] does so. *Amici* submit that it must, if Congress' constitutional power "to promote the progress of science and the useful arts" by granting *exclusive* rights is to be properly respected.

The tension that this Court must resolve is not between the Eleventh Amendment and the Patent and Copyright Clause alone. As the Court observed in *Harper & Row Publishers, Inc. v. Nation Enterprises*,[18]

> it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.

If states and their entities are permitted—as they will be if the decision of the court of appeals is not reversed —to steal from the First Amendment market those things for which others must pay,[19] then economic incentives to create and distribute all manner of copyrighted works will be reduced, and the marketplace of ideas impoverished.

Protection for *amici's* copyrights and their substantial investment in those copyrights depends on their ability to secure either the protection that Congress undoubtedly intended to provide in 1976, or additional legislation to the same effect containing the magic words this Court has subsequently held may be necessary to achieve the intended result. If Congress presently lacks the power

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[17] *See* 1 Stat. 109 (1790) (First patent law); 1 Stat. 124 (1790) (First copyright law).

[18] 471 U.S. 539, 558 (1985).

[19] Under the court of appeals' decision, *e.g.*, Stanford University and the University of Southern California—private institutions—would have to pay copyright royalties or receive copyright owners' authorization to perform the activities that the University of California may—"with impunity"—do in "violat[ion] of the federal copyright laws . . . ." *BV Engineering*, 858 F.2d at 1400.

to subject states to copyright infringement actions in federal court, Congress would have to decide whether to jettison its long-standing policy against concurrent jurisdiction over copyright actions in state courts, or to seek adoption of a constitutional amendment permitting federal court suits against states for copyright infringement. Whatever approach is necessary, time is of the essence. Demonstrably, this case would be an appropriate vehicle to clear away roadblocks to achieving, through any of these routes, the protection Congress both intended and clearly will provide, if necessary.

On the merits of this question, *amici* submit that Congress clearly has the power, under Article 1 of the Constitution, to abrogate Eleventh Amendment immunity. This court has suggested that such power exists, and, as set out below, several courts of appeals have expressly reached this conclusion. See, e.g., *Green v. Mansour*, 474 U.S. 64, 68 (1985) ("Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, *pursuant to a valid exercise of power*, unequivocally expresses its intent to abrogate the immunity") (emphasis added); *Welch*, 107 S. Ct. at 2946 (power assumed); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252-53 (1985) (same); *United States v. Union Gas Co.*, 832 F.2d 1343, 1356 (3d Cir. 1987), *cert. granted sub. nom. Pennsylvania v. Union Gas Co.*, 108 S.Ct. 219 (1988) (constitutional amendments not to be read as if on a time line; "a constitutional grant of plenary authority to Congress" sufficient to abrogate Eleventh Amendment immunity); *In re McVey Trucking, Inc.*, 812 F.2d 311, 314-23 (7th Cir.), *cert. denied*, 108 S.Ct. 227 (1987) (discussing *Atascadero* and its predecessors, and concluding, after extensive analysis, that the various congressional plenary powers cannot be distinguished); *In re Vasquez, Guerrero and Compton*, 788 F.2d 130, (3d Cir.), *cert. denied*, 107 S.Ct. 414 (1986) (abroga-

tion of Eleventh Amendment immunity under Bankruptcy Clause); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979), *"overruled sub silentio"* [by *Atascadero* and *Welch*], *BV Engineering v. UCLA*, 858 F.2d 1394, 1398 n.1 (9th Cir. 1988) ("[T]he Copyright and Patent Clause is a specific grant of constitutional power that contains inherent limitations on state sovereignty . . . [A]brogation of a state's Eleventh Amendment immunity is inherent in the Copyright and Patent Clause and the Copyright Act"); *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1080-81 (5th Cir. 1979) (Congress may abrogate state immunity in an act passed pursuant to the war powers in Art. I. § 8). See also *County of Monroe v. Florida*, 678 F.2d 1124, 1132 n.8, 1133 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983) (Congress may, pursuant to Art. IV, § 2, cl. 2, abrogate state immunity from suit on extradition-related claims).

II. IN THE COPYRIGHT ACT CONGRESS EXPRESSED IN UNMISTAKABLE LANGUAGE ITS CLEAR INTENTION TO SUBJECT STATES TO COPYRIGHT LIABILITY

If, as we have argued, Congress has the power to subject Respondent U.C.L.A. to liability for copyright infringement in federal court, then the question remains whether Congress has exercised that power. Under traditional standards, and even under the more demanding standards that this Court has recently announced,[20] the answer to the question here, as recognized by the dissent in *Richard Anderson Photography*,[21] is plainly "yes." Be-

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[20] Where, as here, there is no real alternative remedy or forum, the Court should not be reluctant to find congressional intent to abrogate, and the stringent requirements of *Atascadero State Hospital v. Scanlon, supra*, and *Welch v. State Dept. of Highways, supra*, should not apply. But this Court need not reach that conclusion since, as will be shown, those stringent requirements are met here.

[21] 852 F.2d at 126-129.

cause Congress clearly expressed its intent to require states to respect rights granted in the Copyright Act—rights that can be enforced *only* in federal court—the conclusion is inescapable that Congress successfully abrogated state immunity.

The Copyright Act, 17 U.S.C. §§ 101 *et seq.*, encourages the production of artistic or literary works by granting authors and publishers valuable and enforceable rights, such as the exclusive rights to reproduce and distribute copyrighted works. § 106. As part of the broad scheme of copyright protection embodied in the Act, § 501(a) provides that "Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright" (emphasis added). All infringers of copyright,[22] with only limited exceptions in narrow circumstances, are subject to actions for damages and injunctions (§§ 502, 504).

Unlike statutes considered in cases where the issue has been not whether Congress intended to create a remedy at all but only in what courts the remedy could be obtained, the Copyright Act contains both inclusive language in § 501(a) and several other provisions that specifically show Congress' intent to bring the states within its reach, and to render them liable as infringers in the same manner as all other defendants, except where specific exemptions were carefully carved out. *See generally*

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[22] Courts have recognized that "the Copyright Act's general authorization for suit against 'anyone' is sufficiently broad to include the States." *Richard Anderson Photography v. Radford University*, 633 F. Supp. at 1159. See also *Johnson v. University of Virginia*, 606 F. Supp. 321, 324 (D. Va. 1985) (reasoning that "the language of the 1976 Act is at least as sweeping, and probably more sweeping, than the language of the 1909 Act in identifying the class of defendants subject to copyright infringement suits" and concluding that "the 1976 Act waived the states' Eleventh Amendment immunity from liability for damages and equitable relief for copyright infringements").

Richard Anderson Photography, 852 F.2d at 126-129 (dissent).[23]

There should be no doubt that the phrase "governmental bodies" used repeatedly in the statute, both as used colloquially and, more importantly here, as used throughout the copyright revision program that culminated in the Copyright Act of 1976, includes state entities. *See* House Comm. on the Judiciary, Copyright Law Revision, "Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law," 87th Cong., 1st Sess. at 129 (1961) (hereinafter "1961 Register's Report"), expressly noting that the law contained "nothing to prevent *governmental bodies*, at least of the States, from securing copyright. . . ." (emphasis added).

Beyond these statutory provisions, Congress' intent to allow states to be sued in federal court for violating the Copyright Act is shown by the express statutory scheme of the Act itself. First, in § 106, Congress granted to copyright owners *exclusive* rights, subject only to carefully crafted exemptions.[24] Second, in § 301, Congress

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[23] The Court used similar reasoning in holding, in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), that exhaustion of state administrative remedies is not a prerequisite to an action in federal court under 42 U.S.C. § 1983. The Court examined a statute enacted after § 1983 that created a "specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983," *id.* at 508, and concluded that the exhaustion provisions of the more recent statute "make sense, and are not superfluous," only if Congress intended that § 1983 contain no general requirement of administrative exhaustion. *Id.* at 512. Similarly, the exemptions in the Copyright Act for state activity "make sense, and are not superfluous," only if Congress intended to abrogate state immunity and subject states to suit for copyright infringement.

[24] See *Goldstein v. California*, 412 U.S. 546, 560 (1973) (discussing, in a case considering a state's anti-piracy statute, the inherently broad reach of federal copyright protection): "When Congress grants an exclusive right or monopoly, its effects are pervasive; *no citizen or State may escape its reach.*" (emphasis added).

expressly preempted all state copyright laws—and even state laws equivalent to copyright. Third, 28 U.S.C. § 1338(a) grants to the federal courts exclusive jurisdiction of all actions arising under the federal copyright laws.

Finally, the Copyright Act permits the states themselves to obtain copyright protection. Congress, when it enacted the law, was well aware that states and state entities regularly obtained federal copyright protection for their works.[25] There is no basis in the legislative history for assuming that Congress intended to permit the states regularly to take advantage of the full benefits of the Copyright Act and at the same time be free of its obligations.

Since all copyright claims must be brought in federal court, applying the federal copyright laws, a decision denying a federal forum to claimants who allege copyright violations by states is essentially a conclusion that Congress intended to leave these claimants without a meaningful remedy, and to permit states to disregard the rights of copyright owners with impunity.

In this critcial aspect the Copyright Act is altogether different from the statutes the Supreme Court has determined did not abrogate state immunity. In *Welch v. State Dep't of Highways*, *supra*, 107 S.Ct. at 2953 n.19,

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[25] *See* 1961 Register's Report, *supra*, at 129 ("Almost every State in the Union has registered copyright claims in some of its informational publications"). See also Senate Comm. on the Judiciary, *Copyright Law Revision Study No. 33*, "Copyright in Government Publications," 86th Cong., 2d Sess. at 129 (Comm. Print 1961) ("Most of the States have enacted statutes for the securing of copyright in certain of their publications or in their publications generally. And even in the absence of any statute, almost every State has claimed copyright in some of its publications. A survey by the Copyright Office shows that during the 5-year period 1950 through 1954 about 4,700 copyright claims were registered in the name of a State or a State agency or in the name of an official on behalf of a State.") See generally 1 M. Nimmer, *Nimmer on Copyright* § 5.06[A] n.1 (1988).

for example, the Court recognized that the plaintiff there was "not without a remedy: she may file a worker's compensation claim against the State under [state law]." Similarly, in *Atascadero State Hospital v. Scanlon, supra*, 473 U.S. at 238 n.2, the Court explained that immunity from federal suit under the statute involved there would not exempt the states from compliance with the law, because they would still be subject to suit in state court. The Court emphasized, "It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Id.*

There is not a shred of evidence to suggest that Congress intended to leave states free to violate federal law by infringing the rights of copyright owners. To the contrary, the entire statutory scheme unmistakably expresses Congress' intent to abrogate state immunity. To uphold the court of appeals' decision would frustrate that express Congressional intent.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

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